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Case No.

IN THE

SUPREME COURT OF THE UNITED STATES

OSCAR MASON, Jr.,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

JERRY HILL
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

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QUESTION PRESENTED

Whether the Supreme Court of Florida has adopted such a broad and vague construction of Section 921.141(5)(i), Florida Statutes, which provides for an aggravating circumstance if the capital murder was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification, as to violate the Eighth and Fourteenth Amendments?

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OPINIONS BELOW

The opinion and judgment of the Supreme Court of Florida sought to be reviewed via this petition is officially reported at 438 So.2d 374 and is reproduced in the appendix to this petition. (A1-10)

JURISDICTION OF THE SUPREME COURT

The Supreme Court of Florida issued its opinion and judgment in this case on September 8, 1983. (A1-10) Petitioner filed a motion for rehearing which was denied on October 27, 1983. (A11) Title 28 United States Code, Section 1257(3) and Rule 17 of the United States Supreme Court Rules confers certiorari jurisdiction in this Court to review the judgment in this case.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment VIII to the Constitution of the United States:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Amendment XIV, Section 1 to the Constitution of the United States, in part:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 921.141, Florida Statutes (1979) which is set forth in the appendix. (A12-14)

STATEMENT OF THE CASE

On September 3, 1980, a Hillsborough County, Florida, grand jury indicted Petitioner for first degree murder for the stabbing death of Linda Sue Chapman. (R3) [1/] Petitioner proceeded to a jury trial in which he was convicted as charged. (R809-810) The jury recommended a death sentence (R846), and the trial court imposed death. (R201,224) On appeal, the Supreme Court of Florida affirmed Petitioner's conviction and death sentence. (A1-10) Mason v. State, 438 So.2d 374 (Fla.1983).

The evidence at trial established that Linda Sue Chapman was stabbed once in the chest while she slept in her apartment which she shared with her three children. (R415-420, 475-497) The perpetrator entered through a window (R486-512, 508-509) and armed himself with a knife from Chapman's kitchen. (R439,468,481) A butcher knife was found on the bed beside her body. (R420) The single stab wound severed a main pulmonary artery and caused her death from one to ten minutes later. (R561-562) There was no evidence of a motive for the killing.

During the penalty phase of the trial, the State and Petitioner produced additional evidence relevant to aggravating and mitigating circumstances. The State presented certified copies of judgments where Petitioner had been convicted of violent felonies. (R816-827) Petitioner presented the testimony of two psychiatrists who testified to Petitioner's mental retardation and drug usage. (R1033-1037) Petitioner also testified in his own behalf. (R834-837) He told the jury that he was one of nine children, that he had a fourth grade education, could not read or write, that he had worked primarily as a fruit picker and had always depended on his mother for support. (R834-837)

1/ The letter "R" denotes references to the record on appeal in the court below, and the letter "A" denotes references to the appendix to this petition.

In sentencing Petitioner to death, the trial court found no mitigating circumstances and five aggravating as provided for in Section 921.141, Florida Statutes. (R211-221) The aggravating circumstances found were:

> (1) The defendant was previously convicted of a felony involving the use or threat of violence to the person. Subsection (5)(b). (R211-212)
>
> (2) The defendant knowingly created a great risk of death to many persons. Subsection (5)(c). (R212-213)
>
> (3) The capital felony was committed while the defendant was engaged in the commission of a burglary. Subsection (5)(d). (R213-215)
>
> (4) The capital felony was especially heinous, atrocious and cruel. Subsection (5)(h). (R216-220)
>
> (5) The capital felony was cold, calculated and premeditated without any pretense of moral or legal justification. Subsection (5)(i). (R220-221)

On appeal, the Supreme Court of Florida affirmed. Mason v. State, 438 So.2d 374 (Fla.1983)(A1-10) That court approved the trial court's findings except for the aggravating circumstance that Petitioner knowingly created a great risk of death to many persons. (A6) In approving that the homicide was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification, the court's opinion noted,

> We also disagree with appellant's argument that the murder was not "committed in a cold, calculated, and premeditated manner without any basis of moral or legal justification." See §921.141(5)(i), Fla.Stat. (1979). Appellant contends that the evidence introduced at trial failed to show any extraordinary coldness or calculation or that the killer acted with no moral or legal justification, that there was little evidence of premeditation, and that this particular finding was an improper doubling of aggravating circumstances because it was based on the same facts as the "heinous, atrocious, and cruel" finding. See Provence v. State, 337 So.2d 783 (Fla.1976), cert.denied, 431 U.S. 969 (1977).
>
> The record shows that appellant broke into Mrs. Chapman's home, armed himself in her kitchen, and attacked her as she lay sleeping in bed. Nothing indicates that she provoked the attack in any way or that appellant had any reason for committing the murder. There was sufficient evidence for the trial court to find this circumstance applicable.

(A7)

REASONS FOR GRANTING THE WRIT

> The Supreme Court of Florida has adopted such a broad and vague construction of Section 921.141(5)(i), Florida Statutes, which provides for an aggravating circumstance if the capital homicide was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification, as to violate the Eighth and Fourteenth Amendments.

In Godfrey v. Georgia, 446 U.S. 420 (1980), this Court held that an aggravating circumstance in Georgia's capital sentencing law was unconstitutionally applied in violation of the Eighth and Fourteenth Amendments because it failed to narrow the class of persons eligible for the death penalty. The Georgia court had adopted an impermissibly vague construction of the statutory aggravating circumstance provided for when a murder was "outrageously or wantonly vile, horrible and inhuman." Ibid. This Court noted that the statutory language itself provided no restraint on the arbitrary and capricious infliction of a death sentence, and therefore, it was incumbent upon the state court to provide interpretation of the statute which placed its application within constitutional parameters. Since the Georgia court failed in this regard in Godfrey, this Court reversed the petitioner's death sentence. Ibid.

Like the Georgia court in Godfrey, the Supreme Court of Florida in the instant case has adopted a vague interpretation and application of an aggravating circumstance included in Florida's capital sentencing law. Section 921.141(5)(i), Florida Statutes (1979), provides for an aggravating circumstance if a capital murder

> ...was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

Recognizing that premeditation is an element of first degree murder and that not every such murder should qualify for the aggravating circumstance, the Supreme Court of Florida in Combs v. State, 403 So.2d 418 (Fla.1981) held that there must be something more than mere premeditation to justify the application of this aggravating factor. Ibid., at 421; see also, Jent v. State, 408

So.2d 1024, 1032 (Fla.1982). Until now, the Supreme Court of Florida has typically required some evidence of motive or intent to justify finding the something more required for this circumstance. 2/ However, in Petitioner's case the court approved the aggravating circumstance where there was no evidence of motive or intent beyond mere premeditation. Mason v. State, 438 So.2d 374, 379 (Fla.1983).

The prosecution's case against Petitioner was entirely circumstantial. In reviewing the evidence, the Supreme Court of Florida concluded that it

> ...shows that [Petitioner] broke into Mrs. Chapman's home, armed himself in her kitchen, and attacked her as she lay sleeping in bed. Nothing indicates that she provoked the attack in any way or that [Petitioner] had any reason for committing the murder.

Ibid., at 379. Upon these facts, the Florida Court held,

> There was sufficient evidence for the trial court to find [the cold, calculated and premeditated aggravating] circumstance applicable.

Ibid. Consequently, the Florida Supreme Court approved this aggravating evidence upon the lack of evidence of a reason for the murder. The Florida Court has on occasion looked to evidence of provocation or that the homicide occurred during another felony to rejected the cold, calculated and premeditated factor. 3/ But, in Petitioner's case, it is apparent that the court required proof of such reasons, and absent that proof, the circumstance was presumed.

2/ See, e.g., Combs v. State, 403 So.2d 418 (Fla.1981)(evidence of substantial prior planning of robbery and execution-style murders); Jent v. State, 408 So.2d 1024 (Fla.1981)(victim beaten and raped by four men before being doused with gasoline and set afire); Hill v. State, 422 So.2d 816 (Fla.1982)(defendant planned rape and murder substantially before victim selected); Bolender v. State, 422 So.2d 833 (Fla.1982)(victims beaten to death in an attempt to force them to reveal whereabouts of their cocaine); Middleton v. State, 426 So.2d 548 (Fla.1981)(defendant watched sleeping victim over an hour while contemplating the killing); Lightbourne v. State, 438 So.2d 380 (Fla.1983)(rape-robbery victim shot while begging for her life).

3/ See, e.g., McCray v. State, 416 So.2d 804 (Fla.1982)(victim confronted defendant after theft); Cannady v. State, 427 So.2d 723 (Fla.1983)(victim jumped as if to attack defendant before defendant fired five shots).

The burden of proving the circumstance has been shifted from the State, [4/] and a new burden of proving that the circumstance does not exist has been imposed upon the capital defendant. The capital defendant in Florida must now affirmatively prove that the murder was not done in a cold or calculated fashion or that some pretense of moral or legal justification existed. In effect, this premeditation aggravating circumstance now is presumed unless evidence shows otherwise. Such an application of this aggravating circumstance cannot pass constitutional muster. Presuming the factor from a lack of evidence that it does not exist is tantamount to making every premeditated murder eligible for this factor and automatically qualifying for a death sentence. Petitioner urges this Court to grant a writ of certiorari to correct this unconstitutional application of Florida's law.

4/ State v. Dixon, 283 So.2d 1, 9 (Fla.1973) held that the prosecution has the burden of proving aggravating circumstances beyond a reasonable doubt. Furthermore, in Jent v. State, 408 So.2d 1024, 1032 (Fla.1982), the Florida Court held

> ...in the sentencing hearing the state will have to prove beyond a reasonable doubt the elements of the premeditation aggravating factor--"cold, calculated... and without any pretense of moral or legal justification."

CONCLUSION

Upon the foregoing reasons and authorities, Petitioner asks this Court to grant a writ of certiorari.

Respectfully submitted,

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APPENDIX

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Supreme Court of Florida

No. 60,703

OSCAR MASON, JR., Appellant,

v.

STATE OF FLORIDA, Appellee.

[September 8, 1983]

ADKINS, J.

We have for review an order by a circuit court imposing the death penalty upon appellant, Oscar Mason, Jr., (hereinafter appellant). We have jurisdiction. Art. V, § 3(b)(1), Fla. Const.

In the early morning hours of March 19, 1980, eleven-year-old Missy Chapman woke her two brothers, telling them that something was the matter with their mother, Linda Sue Chapman, who lay in bed making choking sounds. Mrs. Chapman, who had been stabbed, died before the police or an ambulance arrived. None of the children reported having seen or heard anyone in their home the night of the killing.

A few days after the killing, Missy contacted a detective working on the case and told him that she had seen her mother being stabbed and had acted asleep until the man left the house. Fear that the killer would return had kept her from disclosing what she saw, claimed Missy. She described the assailant as a skinny black male, seventeen to nineteen years old, with short, dark hair. At a later deposition, however, Missy stated that she could not "actually see what [the killer] looked like." She was also unable, at a line-up or from photographs, to identify appellant or anyone else as the killer. At trial, nevertheless,

Missy pointed out appellant, stating that she was "sure" he was her mother's murderer.

Two of appellant's fingerprints were found on the siding of the Chapman home, but none were found inside. A state's witness also testified that in his opinion, hairs found at the scene were appellant's.

At trial, the judge held admissible evidence concerning appellant's conviction for a rape and robbery committed two days after the Chapman murder. The collateral crime evidence was found relevant to the issue of identity on the basis of the similarity of the modus operandi used in each instance.

Appellant was found guilty of first-degree murder and in accordance with the jury's recommendation, sentenced to death. This appeal followed.

Appellant first argues that the trial court erred in admitting evidence of "an unrelated rape and burglary incident . . . purpo tedly to prove identity." The collateral crime evidence, which was admitted pursuant to and in compliance with section 90.404, Florida Statutes (1979), was introduced only to show bad character or propensity, and showed nothing unique or unusual about him or his supposed modus operandi, asserts appellant. We disagree.

There are, as appellant notes, several distinctions between the two crimes. For example, one was a homicide, the other a rape; one home was ransacked and robbed, the other was not; the knife used in one crime was taken from a kitchen drawer, the other from a kitchen sink, and so on. Especially important, states appellant, are the dissimilar physical descriptions of the attackers given by the state's witness in each case.

There are, however, many similarities between the crimes. They occurred within two days and eight-tenths of a mile of each other. In both cases the attacker entered the home through a window, armed himself with a knife from the kitchen and assaulted a woman in her bedroom. One victim was stabbed through the heart while the other was verbally threatened with the same, and a

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towel was found in the bedroom and outside near the points of entry at both locations. Finally, appellant's fingerprints were found at both scenes.

In Williams v. State, 110 So.2d 654 (Fla.), cert. denied, 361 U.S. 847 (1959), this Court held that "evidence of any facts relevant to a material fact in issue except where the sole relevancy is character or propensity of the accused is admissible unless precluded by some specific exception or rule of exclusion." 110 So.2d at 663. The similar facts here were intended to show that the same modus operandi was used in the incidents, which would be relevant to the identity of Mrs. Chapman's killer.

In Drake v. State, 400 So.2d 1217 (Fla. 1981), we explained what is required for similar facts to be admissible to show a mode of operation and, hence, identity:

> The mode of operating theory of proving identity is based on both the similarity of and the unusual nature of the factual situations being compared. A mere general similarity will not render the similar facts legally relevant to show identity. There must be identifiable points of similarity which pervade the compared factual situations. Given sufficient similarity, in order for the similar facts to be relevant the points of similarity must have some special character or be so unusual as to point to the defendant.

400 So.2d at 1219.

There are enough identifiable points of similarity in the cases here being compared, and they are unusual enough, that the trial court was warranted in permitting the introduction of the evidence. We will not disturb its ruling admitting the testimony regarding the rape and robbery.

Appellant next argues that certain comments made by the prosecutor during both the guilt and penalty phases of his trial constituted fundamental error. In closing argument at the guilt phase, the prosecutor warned the jury that if appellant were turned loose "he is going to do two days later . . . just what he did two days after March the 18th" - [i.e. rob and rape]. In closing argument during the penalty phase of the trial, the

prosecutor stated that appellant "has established a very, very clear pattern of criminality" and "absolutely cannot be rehabilitated." The comments were so prejudicial, claims appellant, that he is entitled to a new trial.

In Blair v. State, 406 So.2d 1103 (Fla. 1981), citing several other cases, we refused to order a new trial despite allegedly improper remarks by a prosecutor. The remarks were not "of such a nature so as to poison the minds of the jurors or to prejudice them so that a fair and impartial verdict could not be rendered," did not "materially contribute" to the conviction, were not "so harmful or fundamentally tainted so as to require a new trial," and were not so inflammatory as to "have influenced the jury to reach a more severe verdict of guilt than it would have otherwise." 406 So.2d at 1107 (citations omitted).

The observations in Blair, lead us to conclude that although the comments of which appellant complains might warrant reversal in some cases, they do not here. Compelling evidence of appellant's guilt was presented during his trial, and the aggravating factors found applicable at sentencing significantly outweighed those in mitigation. We do not believe that the statements contributed materially to the verdict or the recommended sentence.

Also worth noting is that appellant's attorney objected to the statement made during the guilt phase of the trial, the court sustained the objection, and the jury was instructed to disregard the comment. While such an instruction alone does not eliminate fundamental error, it is further evidence that the relatively immaterial comment does not require a reversal. As for the statement made during the penalty phase, it was never objected to and so the matter was not preserved for appellate review. See Clark v. State, 363 So.2d 331 (Fla. 1978). Had it been preserved, we would put it in the same category as the statement made during the guilt phase.

Appellant next alleges that the evidence identifying him as Mrs. Chapman's killer was insufficient and so the trial court

erred in denying his motion for judgment of acquittal. Appellant contends that Missy Chapman's in-court identification was made under blatantly suggestive conditions and conflicted with prior statements that she had made to the police, that there was no evidence that his fingerprints found on the outside of the Chapman home were not placed there some time before the murder, that the comparison test which identified hairs found on a towel outside the house as his was scientifically unsound, and that there was no evidence of how his hairs ended up on the towel or how the towel ended up outside the house.

We agree with appellant that Missy Chapman's identification of him as the assailant has little credibility. Before trial she stated that when the murderer was in the bedroom, his back was towards her and that she could not "actually see what he looked like." At a line-up held one week after the killing Missy failed to identify appellant as the killer and when photographs of those in the line-up were later shown to her she again failed to pick him out. Finally, at trial, almost one year after the murder, Missy identified appellant as the man that she had seen. He was, however, the only black man at counsel's table and she had been informed that the man charged with killing her mother would be in the courtroom. The courtroom conditions were too suggestive, and her prior attempts too unsuccessful, to give much credence to Missy's identification of appellant.

The other evidence, however, was not so flawed. The fingerprints found at the scene were identified as appellant's and they were on the sill of the window through which the killer evidently entered the house. Appellant's speculation that the prints could have been put there before the night of the killing does not affect the relevance of that evidence; it simply reflects that the jury may give the prints as much or little probative value as it sees fit.

The same is true of the evidence regarding the hairs. They were identified as appellant's and were on a piece of towel

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matching the description of a towel which Missy said that her mother had used the night of the murder. Why Missy did not awaken as the towel was ripped and how the towel got outside may be questions which the jury considered in weighing the evidence, but they do not destroy its relevance.

Finally, as previously noted, the collateral crimes evidence was relevant and its admission was not improper. Thus, in view of the foregoing, there was sufficient evidence to support the trial court's denial of appellant's motion for judgment of acquittal.

Appellant's fourth point on appeal is that the trial court erred, at the sentencing phase of the trial, by finding applicable the aggravating circumstance that he had previously been convicted of another felony involving the use or threat of violence to the person. See § 921.141(5)(b), Fla. Stat. (1979). While some of the prior convictions on which the trial court relied will not support such a conclusion, two certainly will. Appellant's prior convictions for attempted murder and rape warranted application of the aggravating factor in question.

The fifth issue raised is whether the presence of the victim's three children during the murder warranted the finding that appellant created "a great risk of death to many persons." See § 921.141(5)(c), Fla. Stat. (1979). We have held that three other people do not qualify as "many persons," see Johnson v. State, 393 So.2d 1069 (Fla. 1980), cert. denied, 454 U.S. 882 (1981), and so that particular aggravating circumstance was not applicable in the case at bar.

We do agree, however, with the trial court's finding that this murder was heinous, atrocious, and cruel. See § 921.141(5)(h), Fla. Stat. (1979). Mrs. Chapman's son, Westley, testified that when he went to check on his mother she was first looking at the ceiling and then turned to look at him, all the while making choking and gurgling sounds. A medical examiner testified that the victim probably lived from one to ten minutes after being stabbed, that the sounds that Westley heard were of

Mrs. Chapman choking on her own blood, and that she was probably aware of her impending death.

The manner in which Mrs. Chapman died, sets this crime apart from the norm of capital felonies. See State v. Dixon, 283 So.2d 1 (Fla. 1973), cert. denied, 416 U.S. 943 (1974). She was not killed quickly and painlessly, but instead lingered, unable to breathe and aware of what was happening to her. The killing was certainly "unnecessarily torturous to the victim," Dixon, at 9, and, in view of other cases addressing this point, heinous, atrocious, and cruel.

We also disagree with appellant's argument that the murder was not "committed in a cold, calculated, and premeditated manner without any basis of moral or legal justification." See § 921.141(5)(i), Fla. Stat. (1979). Appellant contends that the evidence introduced at trial failed to show any extraordinary coldness or calculation or that the killer acted with no moral or legal justification, that there was little evidence of premeditation, and that this particular finding was an improper doubling of aggravating circumstances because it was based on the same facts as the "heinous, atrocious, and cruel" finding. See Provence v. State, 337 So.2d 783 (Fla. 1976), cert. denied, 431 U.S. 969 (1977).

The record shows that appellant broke into Mrs. Chapman's home, armed himself in her kitchen, and attacked her as she lay sleeping in bed. Nothing indicates that she provoked the attack in any way or that appellant had any reason for committing the murder. There was sufficient evidence for the trial court to find this circumstance applicable.

Nor was there an improper doubling of aggravating factors. As appellee notes, the factor in section 921.141(5)(h) pertains to the nature of the killing itself, while section 921.141(5)(i) relates more to the killer's state of mind, intent, and motivation. These two aggravating factors were not found applicable based on the same facts.

The eighth issue raised on appeal is that the trial judge erred in failing to find applicable any statutory mitigating circumstances. Appellant argues, first, that his use of nerve medication and his hostile behavior warranted a finding that he acted under extreme mental or emotional disturbance, second, that his below normal intelligence and deprived background warranted a finding that his capacity was substantially impaired, and, third, that his age should have been considered a mitigating factor. The record contains evidence which contradicts the first two circumstances, and so we will not interfere with the trial judge's decisions with regard thereto. They were within his discretion and there was a sufficient basis for each. As for appellant's argument regarding his age (20 years), in Peek v. State, 395 So.2d 492 (Fla.), cert. denied, 451 U.S. 964 (1981), we affirmed a decision which refused to apply as a mitigating factor the defendant's age of twenty years. Again, the trial judge acted within the bounds of his discretion on this point.

The last issue on appeal is whether the trial court improperly failed to consider non-statutory mitigating circumstances and erred by not instructing the jury on the existence of such. We have held that the jury instructions which were used here adequately advise "the jury that the list of statutory mitigating factors is not exhaustive." 395 So.2d at 496. As for the assertion that the judge himself failed to consider such circumstances, the non-statutory evidence which appellant contends should have been considered was known to the court. Rather than having been ignored, it appears that the evidence was considered and rejected. The trial judge need not have expressly addressed each non-statutory mitigating factors in rejecting the same, and we will not disturb his judgment simply because appellant disagrees with the conclusions reached.

Because no issue has been raised which warrants reversal of appellant's conviction or sentence, the same are hereby affirmed.

It is so ordered.

ALDERMAN, C.J., BOYD and EHRLICH, JJ., Concur
OVERTON, J., Concurs in the conviction, but concurs in the result only to the sentence.
McDONALD, J., Concurs in part and dissents in part with an opinion.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

McDONALD, J., concurring in part, dissenting in part.

I concur in the conviction and all that is said in conjunction thereto, but I would remand for a new sentencing order. The trial judge clearly erred in holding that this homicide was a great risk of danger to many persons. I also disagree with his and the majority's finding that it was proved beyond a reasonable doubt that the homicide was committed in a cold, calculated, and premeditated manner. Since there appears some evidence in mitigation relative to the defendant's ignorance, dull mental capacity, and the history of his childhood, and being unable to say with certainty that the sentencing judge would impose the death penalty when he is unaided by the improper aggravating findings, the present sentence should be vacated with instructions to the trial judge to resentence the defendant.

An Appeal from the Circuit Court in and for Hillsborough County,

Richard E. Leon, Judge - Case No. 80-7632 C

Jerry Hill, Public Defender; and W. C. McLain and Samuel R. Mandelbaum, Assistant Public Defenders, Tenth Judicial Circuit, Bartow, Florida,

for Appellant

Jim Smith, Attorney General and Peggy A. Quince, Assistant Attorney General, Tampa, Florida,

for Appellee

AID

IN THE SUPREME COURT OF FLORIDA

THURSDAY, OCTOBER 27, 1983

OSCAR MASON, JR.,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

CASE NO. 60,703

Circuit Court Case No. 80-7632 C

On consideration of the motion for rehearing filed by attorneys for appellant,

IT IS ORDERED that said motion be and the same is hereby denied.

RECEIVED BY
OCT 31 1983

A True Copy

TEST:

Sid J. White
Clerk Supreme Court

By: Cullen Causey
Deputy Clerk

C
cc: Hon. James F. Taylor, Jr., Clerk
Hon. J. C. Cheatwood, Chief Judge

W. C. McLain, Esquire
Peggy A. Quince, Esquire

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SECTION 921.141, FLORIDA STATUTES (1979)

Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence.--

(1) SEPARATE PROCEEDINGS ON ISSUE OF PENALTY.--Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by s.775.082. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If, through impossibility or inability, the trial jury is unable to reconvene for a hearing on the issue of penalty, having determined the guilt of the accused, the trial judge may summon a special juror or jurors as provided in chapter 913 to determine the issue of the imposition of the penalty. If the trial jury has been waived, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose, unless waived by the defendant. In the proceeding, evidence may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (5) and (6). Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the Constitution of the State of Florida. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

(2) ADVISORY SENTENCE BY THE JURY.-- After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court based upon the following matters:

(a) Whether sufficient aggravating circumstances exist as enumerated in subsection (5);

(b) Whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist; and

(c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.

(3) FINDINGS IN SUPPORT OF SENTENCE OF DEATH.-- Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:

(a) That sufficient aggravating circumstances exist as enumerated in subsection (5), and

(b) That there are insufficient mitigating circumstances to outweigh the aggravating circumstances.

In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (5) and (6) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence, the court shall impose sentence of life imprisonment in accordance with s.775.082.

(4) REVIEW OF JUDGMENT AND SENTENCE.--The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Florida within 60 days after certification by the sentencing court of the entire record, unless the time is extended for an additional period not to exceed 30 days by the Supreme Court for good cause shown. Such review by the Supreme Court shall have priority over all other cases and shall be heard in accordance with rules promulgated by the supreme court.

(5) AGGRAVATING CIRCUMSTANCES.--Aggravating circumstances shall be limited to the following:

(a) The capital felony was committed by a person under sentence of imprisonment.

(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

(c) The defendant knowingly created a great risk of death to many persons.

(d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.

(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) The capital felony was committed for pecuniary gain.

(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital felony was especially heinous, atrocious, or cruel.

(i) The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

(6) MITIGATING CIRCUMSTANCES.--Mitigating circumstances shall be the following:

(a) The defendant has no significant history of prior criminal activity.

(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's conduct or consented to the act.

(d) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.

(e) The defendant acted under extreme duress or under the substantial domination of another person.

(f) The capacity of the defenant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(g) The age of the defendant at the time of the crime.

CERTIFICATE OF SERVICE

I, WILLIAM C. McLAIN, a member of the Bar of the Supreme Court of the United States and counsel of record for OSCAR MASON, JR., the Petitioner, hereby certify that on December 21, 1983, pursuant to Supreme Court Rule 28, I served a single copy of the foregoing Petition for Writ of Certiorari to the Supreme Court of Florida with attached Appendix on each of the parties as follows:

On the State of Florida, The Respondent, by depositing said copy in the United States Post Office, Bartow, Florida, with first class postage prepaid, properly addressed to PEGGY QUINCE, Assistant Attorney General, Park Trammell Building, 1313 Tampa Street, 8th Floor, Tampa, Florida 33602.

BY: William C. McLain

WILLIAM C. McLAIN
Assistant Public Defender
Chief, Capital Appeals

Case No. **ORIGINAL**

IN THE

SUPREME COURT OF THE UNITED STATES

RECEIVED
DEC 22 1983
OFFICE OF THE CLERK
SUPREME COURT, U.S.

OSCAR MASON, JR.,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

83-5977

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

Petitioner, OSCAR MASON, JR., asks leave to file the attached Petition for Writ of Certiorari to the Supreme Court of Florida without prepayment of costs and to proceed in forma pauperis pursuant to Rule 46. In support of this motion, Petitioner states:

1. That he was convicted on April 23, 1981, in the Circuit Court for Hillsborough County, Florida, for first degree murder.

2. That he received a sentence of death for first degree murder and is presently in custody on Death Row at Florida State Prison.

3. That he appealed to the Supreme Court of Florida, and that Court affirmed his conviction and death sentence.

4. That he has been represented by appointed counsel throughout his state court appeal proceedings.

5. That his affidavit of insolvency in support of this motion is attached.

Respectfully submitted,

BY: William C. McLain

WILLIAM C. McLAIN
Assistant Public Defender
Chief, Capital Appeals

Case No.

IN THE

SUPREME COURT OF THE UNITED STATES

OSCAR MASON,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

AFFIDAVIT IN SUPPORT OF PETITIONER'S MOTION TO PROCEED IN FORMA PAUPERIS

I, OSCAR MASON, being first duly sworn, depose and say that I am the Petitioner in the above-styled case; that in support of my motion to proceed on my Petition for Certiorari without being required to prepay fees, costs or give security therefor, I state that because of my poverty, I am unable to pay the costs of said proceeding or to give security therefor; and that I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the costs of the proceedings are true:

1. Are you presently employed? Yes____ No__x__

a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer. _____

b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received. Summer, 1979 - $115 or $120 per week at Church's Fried Chicken

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source? Yes____ No x

a. If the answer is yes, describe each source of income, and state the amount received from each during the past twelve months._____

_____

_____

3. Do you own any cash or checking or savings account? Yes____ No x

a. If the answer is yes, state the total value of the items owned._____

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? Yes____ No x

a. If the answer is yes, describe the property and state its approximate value._____

_____

_____

5. List the persons who are dependent upon you for support and state your relationship to those persons._____

NONE

_____

I understand that a false statement or answer to any question in this affidavit will subject me to penalties for perjury.

Oscar Mason

Petitioner - Oscar Mason

Subscribed and sworn to before me this 1 day of December, 1953.

Notary Public

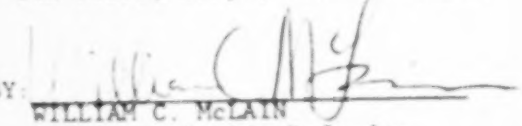
My Commission Expires:

NOTARY PUBLIC, STATE OF FLORIDA AT LARGE
MY COMMISSION EXPIRES SEPTEMBER 15, 1956

CERTIFICATE OF SERVICE

I, WILLIAM C. McLAIN, a member of the Bar of the Supreme Court of the United States and counsel of record for OSCAR MASON, JR., the Petitioner, hereby certify that on December 21, 1983, pursuant to Supreme Court Rule 28, I served a single copy of the foregoing Motion for Leave to Proceed in Forma Pauperis with attached Affidavit of Insolvency on each of the parties as follows:

On the State of Florida, The Respondent, by depositing said copy in the United States Post Office, Bartow, Florida, with first class postage prepaid, properly addressed to PEGGY QUINCE, Assistant Attorney General, Park Trammell Building, 1313 Tampa Street, 8th Floor, Tampa, Florida 33602.

BY: 

WILLIAM C. McLAIN
Assistant Public Defender
Chief, Capital Appeals

Hall of Justice Building
455 North Broadway Avenue
Bartow, Florida 33830
(813) 533-1184 or 533-0931

COUNSEL FOR PETITIONER

Office - Supreme Court, U.S.
FILED
JAN 20 1984
ALEXANDER L. STEVAS,
CLERK

Case No. 83-5977

IN THE

SUPREME COURT OF THE UNITED STATES

OSCAR MASON, JR.

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI IN THE FLORIDA SUPREME COURT

JIM SMITH
ATTORNEY GENERAL

PEGGY A. QUINCE
Assistant Attorney General
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(813) 272-2670

COUNSEL FOR RESPONDENT

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OPINION BELOW

The opinion of the Florida Supreme Court sought to be reviewed is reported as Mason v. State, 438 So.2d 374 (Fla. 1983).

STATEMENT OF THE CASE AND FACTS

Petitioner, Oscar Mason, Jr., was indicted for first-degree murder. After jury trial, he was convicted and a penalty trial was held. The jury recommended death, and the trial court entered an order imposing death. The following aggravating circumstances were found:

1. The defendant was previously convicted of another felony involving the use or threat of violence to the person.

2. The defendant knowingly created a great risk of death to many persons.

3. The capital felony was committed while the defendant was engaged in a burglary.

4. The capital felony was especially heinous, atrocious or cruel.

5. The capital felony was committed in a cold, calculated and premeditated manner.

The court did not find any mitigating circumstances.

On appeal to the Florida Supreme Court the judgment and sentence were affirmed; however, the aggravating factor of great risk of harm to many was stricken. Rehearing was denied and the petition to this court followed.

The following facts were taken from the Florida Supreme Court opinion.

In the early morning hours of March 19, 1980, eleven-year-old Missy Chapman woke her two brothers, telling them that something was the matter with their mother, Linda Sue Chapman, who lay in bed making choking sounds. Mrs. Chapman, who had been stabbed, died before the police or an ambulance arrived. None of the children reported having seen or heard anyone in their home the night of the killing.

A few days after the killing, Missy contacted a detective working on the case and told him that she had seen her mother being stabbed and had acted asleep until the man left the house. Fear that the killer would return had kept her from disclosing what she saw, claimed Missy. She described the assailant as a skinny black male, seventeen to nineteen years old, with short, dark hair. At a later deposition, however, Missy stated that she could not "actually see what [the killer] looked like." She was also unable, at a line-up or from photographs, to identify Appellant or anyone else as the killer. At trial, nevertheless, Missy pointed out appellant, stating that she was "sure" he was her mother's murderer.

Two of Appellant's fingerprints were found on the siding of the Chapman home, but none were found inside. A state's witness also testified that in his opinion, hairs found at the scene were Appellant's.

At trial, the judge held admissible evidence concerning Appellant's conviction for a rape and robbery committed two days after the Chapman murder. The collateral crime evidence was found relevant to the issue of identity on the basis of the similarity of the modus operandi used in each instance.

ARGUMENT

REASON FOR DENYING THE PETITION FOR WRIT OF CERTIORARI.

Respondent respectfully submits this Court should not review by certiorari the Florida Supreme Court's opinion in Mason v. State, supra, because the purported constitutional issue presented in the petition was never presented to the State courts. See Cardinale v. Louisiana, 394 U.S. 437, 89 S.Ct. 1162, 22 L.Ed. 2d 398 (1969). Petitioner raised the following issue in the state court:

"THE TRIAL COURT ERRED IN FINDING AS AN AGGRAVATING CIRCUMSTANCE THAT THE KILLING WAS 'COLD, CALCULATED AND PREMEDITATED, WITHOUT ANY PRETENSE OF MORAL OR LEGAL JUSTIFICATION,' SINCE THE EVIDENCE WAS INSUFFICIENT THEREOF AND IT IS MERELY A 'DOUBLE-UP' OF THE HEINOUS, ATROCIOUS AND CRUEL AGGRAVATING CIRCUMSTANCE."

The argument that followed in no way challenged this aggravating circumstance on constitutional grounds. There was merely an argument as to why the particular facts of the case did not bring it within the aggravating circumstance.

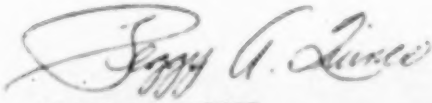
In Cardinale v. Louisiana, supra. the Petitioner had been convicted of murder and sentenced to death. At his trial, his confession had been introduced in its entirety. His argument before this Court alleged parts of the confession were irrelevant and prejudicial, and he contended the Louisiana statute requiring confessions be admitted in their entirety was unconstitutional. Certiorari was granted, but it was learned in oral argument that the constitutional issue had never been presented to the state court. Therefore, this Court, after citing a number of earlier cases which indicated jurisdiction fails unless the federal question was raised and decided in the state court, dismissed the writ for want of jurisdiction. There is no jurisdiction in this case since Mason never presented his federal question to the state court.

CONCLUSION

Based on the foregoing argument the Petition for Writ of Certiorari should be dismissed for lack of jurisdiction.

Respectfully submitted,

JIM SMITH
ATTORNEY GENERAL



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COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to William C. McLain, Assistant Public Defender, 455 North Broadway Avenue, Bartow, Florida, 33830, this 17th day of January, 1984.

Peggy A. Quince
Of Counsel for Respondent